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Mailed: August 3, 2004

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Herbal Dynasty LLC

Serial No. 78058459

Sharon A. Blinkoff of Buchanan Ingersoll for Herbal Dynasty LLC.

John M. Gartner, Trademark Examining Attorney, Law Office
102 (Thomas Shaw, Managing Attorney).

Before Walters, Bottorff and Drost, Administrative Trademark Judges.

Opinion by Walters, Administrative Trademark Judge:

Herbal Dynasty LLC has filed an application to register the mark HERBAL DYNASTY on the Principal Register for "dietary and nutritional supplements," in International Class 5, and "herbal teas," in International Class 30.¹ The application includes a disclaimer of HERBAL apart from the mark as a whole.

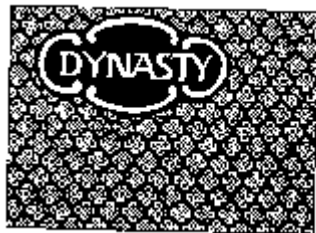
¹ Serial No. 704142001, filed April 14, 2001, based on an allegation of a bona fide intention to use the mark in commerce.

The Trademark Examining Attorney has issued a final refusal to register under Section 2(d) of the Trademark Act, 15 U.S.C. 1052(d), on the ground that applicant's mark so resembles the marks shown below, which are owned by the same party and previously registered for the goods indicated below, that, if used on or in connection with applicant's goods, it would be likely to cause confusion or mistake or to deceive.

DYNASTY

for "Teas, Spices, Food Sauces, except Cranberry and Apple Sauce, Mustard, Bread Crumbs, Batter Mix, Chow Mein Noodles and Saifun (Oriental Noodles) and Plum Sauce" in International Class 30; and

"Canned Bamboo Shoots, Canned Water Chestnuts, Canned Chinese Stir-Fry Vegetables, Canned Lychee Nuts; Sesame Oil, Chicken Stock," in International Class 29.²



for "Tea, Spices, Mustard and Food Sauces, Excluding Cranberry and Apple Sauce," in International Class 30; and

² Registration No. 1,303,967 issued November 6, 1984, to JFC International, Inc. [Sections 8 (6-year) and 15 affidavits accepted and acknowledged, respectively.]

"Canned Sliced Bamboo Shoots, Canned Whole Water Chestnuts, Canned Sliced Water Chestnuts, Canned Chinese Stir-Fry Vegetables, and Sesame Oil," in International Class 29.³

Applicant has appealed. Both applicant and the Examining Attorney have filed briefs, but an oral hearing was not requested.

Our determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the likelihood of confusion issue. See *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also, *In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In considering the evidence of record on these factors, we keep in mind that "[t]he fundamental inquiry mandated by Section 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks." *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976); *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997); and *In re Azteca Restaurant Enterprises, Inc.*, 50 USPQ2d 1209 (TTAB 1999) and the cases cited therein. The factors deemed pertinent in this proceeding are discussed below.

³ Registration No. 1,228,629 issued February 22, 1983, to JFC International, Inc. [Section 15 affidavit acknowledged; renewed for a period of ten years from February 22, 2003.]

The Examining Attorney contends that confusion is likely because the marks are substantially similar and the goods are overlapping. With respect to the marks, the Examining Attorney contends that DYNASTY is the dominant portion of applicant's mark because HERBAL is highly descriptive of the identified goods; that the design portions of the marks in the cited registrations are not significant; and that DYNASTY is the dominant portion of each of registrant's marks.

With respect to the goods, the Examining Attorney contends that applicant's herbal teas in International Class 30 are encompassed within the teas identified in the cited registrations in International Class 30; and that, because applicant characterizes its teas as dietary supplements, applicant's goods in International Class 5 are also identical to tea as identified in the cited registrations.

With its appeal brief, applicant submitted a list of registrations allegedly containing the term DYNASTY.⁴ In view thereof, applicant contends that DYNASTY is a weak component of a mark. Applicant contends further that its mark is distinguished from the registered marks by the addition of the term HERBAL; and that the marks in the cited registrations are further distinguished from applicant's

⁴ The Examining Attorney objected to the untimely submission of this evidence and we have not considered it.

mark by the respective design elements. Quoting from a dictionary definition that was not made of record, applicant argues that "DYNASTY means a sequence of rulers from the same family, stock or group, such as the Ming Dynasty, while HERBAL DYNASTY consistent with the definition of HERBAL and DYNASTY would mean a group of or family of herbs." [Brief, p. 7.]

Regarding the goods, applicant states that its teas are dietary supplements and are subject to labeling regulations different from those for ordinary teas; and argues that "given the nutritive nature of applicant's product it would not be interchangeable with ordinary tea products which lack this special nutritive value." [Brief, p. 9.] As such, applicant contends that consumers will take greater care in purchasing its teas.

We turn, first, to a determination of whether applicant's mark and the registered marks, when viewed in their entirety, are similar in terms of appearance, sound, connotation and commercial impression. The test is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impressions that confusion as to the source of the goods offered under the respective marks is likely to result. The focus is on the recollection of the average purchaser, who

normally retains a general rather than a specific impression of trademarks. See *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975). Furthermore, although the marks at issue must be considered in their entirety, it is well settled that one feature of a mark may be more significant than another, and it is not improper to give more weight to this dominant feature in determining the commercial impression created by the mark. See *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985).

The term DYNASTY in cited Registration No. 1,303,967 appears with minimal font stylization and, thus, differs from applicant's mark, HERBAL DYNASTY, essentially only by the addition of the highly descriptive, if not generic, term HERBAL. Contrary to applicant's contentions, there is no evidence in the record that DYNASTY would have a different connotation as it appears in these two marks. We find that the overall commercial impressions of the two marks are substantially similar.

We reach the same conclusion with respect to the mark in cited Registration No. 1,228,629 and applicant's mark. While there is a more significant design element in this mark than in the mark in the above-cited registration, the design is likely to be perceived as merely a background and/or border design that highlights and focuses attention on the dominant word DYNASTY.

Turning to consider the goods involved in this case, we note that the question of likelihood of confusion must be determined based on an analysis of the goods recited in applicant's application vis-à-vis the goods recited in the registration, rather than what the evidence shows the goods actually are. *Canadian Imperial Bank v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813, 1815 (Fed. Cir. 1987). See also, *Octocom Systems, Inc. v. Houston Computer Services, Inc.*, 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1992); and *The Chicago Corp. v. North American Chicago Corp.*, 20 USPQ2d 1715 (TTAB 1991). Further, it is a general rule that goods or services need not be identical or even competitive in order to support a finding of likelihood of confusion. Rather, it is enough that goods or services are related in some manner or that some circumstances surrounding their marketing are such that they would be likely to be seen by the same persons under circumstances which could give rise, because of the marks used therewith, to a mistaken belief that they originate from or are in some way associated with the same producer or that there is an association between the producers of each parties' goods or services. *In re Melville Corp.*, 18 USPQ2d 1386 (TTAB 1991), and cases cited therein.

Applicant's herbal teas in International Class 30 are encompassed within the broadly identified "teas" in the

cited registrations. Thus, these products are overlapping. There is no need to address the relationship between applicant's herbal teas and the other goods listed in the cited registrations.

Therefore, we conclude that in view of the substantial similarity in the commercial impressions of applicant's mark, HERBAL DYNASTY, and registrant's marks, DYNASTY with different design elements, their contemporaneous use on the overlapping goods in International Class 30 is likely to cause confusion as to the source or sponsorship of such goods.

Despite applicant's statement that its teas are required to be labeled as nutritional supplements, we are concerned with consumer perception of trademarks rather than with labeling issues and there is no evidence in this record that teas are, in fact, nutritional supplements encompassed by applicant's identification of goods in International Class 5. Nor is there any evidence in the record that indicates that applicant's identified goods in International Class 5 are related in any way to the goods identified in the two cited registrations. Therefore, despite the similarity of the marks herein, we find that no confusion as to source or sponsorship is likely with respect the contemporaneous use of the respective marks on applicant's

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goods in International Class 5 and the goods in the cited registration.

Decision: The refusal under Section 2(d) of the Act is affirmed as to applicant's goods in International Class 30 and reversed as to applicant's goods in International Class 5. In due course, the application shall proceed to publication for the goods in International Class 5 only.